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No. 06-1144

Supreme Court, U.S.
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In The
Supreme Court of the United States

UTAH SHARED ACCESS ALLIANCE,

Petitioner,

v.

GLENN CARPENTER, IN HIS CAPACITY AS MANAGER OF THE SALT LAKE FIELD OFFICE OF THE BUREAU OF LAND MANAGEMENT, ET AL., AND SOUTHERN UTAH WILDERNESS ALLIANCE, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether, in the absence of an emergency, the BLM may apply FLPMA section 302(b)'s "prevent unnecessary or undue degradation" provision to eviscerate FLPMA section 202's public participation mandate and FLPMA section 302(a)'s management conformance mandate?

Amicus proposes adding a second question:

2. Whether the BLM must comply with the procedural requirements of NEPA sections 102(C) and (E) when issuing closure orders that are "major federal actions significantly affecting the quality of the human environment?"

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief on behalf of itself in support of Petitioner. Pursuant to Supreme Court Rule 37(2)(a), this *amicus curiae* brief is filed with the written consent of all the parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

MSLF is a nonprofit, membership, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system. MSLF's members include businesses and individuals who live and work in nearly every state of the country. A large number of MSLF's members work in businesses involved in the utilization and development of natural resources and, as a result, are involved actively in many environmental issues. Moreover, MSLF and its members have an interest in ensuring that federal laws and regulations, including the National Environmental Policy Act ("NEPA"), are implemented and enforced in a manner intended by Congress and consistent with the Constitution of the United States. Since its establishment in 1977, MSLF has been active in litigation aimed at ensuring the

[1] Copies of the consent letters have been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole or in part and that no person or entity, other than MSLF, made a monetary contribution to the preparation or submission of this brief.

proper interpretation and application of NEPA. *E.g., Park County Resource Council, Inc. v. U.S. Dep't of Agriculture*, 817 F.2d 609 (10th Cir. 1987) (*amicus curiae*); *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988) (represented intervenor-appellants); *New Mexico v. BLM*, 459 F.Supp.2d 1102 (D.N.M. 2006) (represents intervenor-defendant).

SUMMARY OF THE ARGUMENT

In enacting NEPA, Congress intended the Federal government to work cooperatively with state and local governments and concerned members of the public when analyzing the environmental considerations of government decision making. To this end, a Federal agency must comply with section 102(2) of NEPA and prepare an Environmental Impact Statement ("EIS") or an Environmental Analysis ("EA") whenever a federal agency proposes "major Federal action significantly affecting the quality of the human environment." Contrary to this express statutory language, the Bureau of Land Management ("BLM") did not prepare an EIS or an EA, failed to consider a range of alternatives, and failed to afford affected members of state and local government and the public an opportunity to comment on BLM proposals that "significantly affect[ed] the quality of the human environment." The Tenth Circuit erred when it failed to address whether the BLM's proposals required compliance with NEPA and failed to require BLM to prepare an EIS or EA prior to implementing its proposals.

REASONS FOR GRANTING THE PETITION

I. NEPA MANDATES COMPLIANCE FOR PROPOSED "MAJOR FEDERAL ACTIONS SIGNIFICANTLY AFFECTING THE QUALITY OF THE HUMAN ENVIRONMENT."

A. The Background of NEPA.

In 1969, Congress enacted NEPA, declaring national policy to "use all practicable means and measures, . . . in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331(a). Section 102(2) of NEPA requires that an Environmental Impact Statement ("EIS") be completed by "all agencies of the Federal Government . . . on proposals for . . . major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(A)-(C). Congress, however, did not define these terms.

The Council on Environmental Quality ("CEQ"), which was created by Section 202 of NEPA, has promulgated regulations to implement NEPA. 42 U.S.C. § 4342; *see* 40 C.F.R. 1500.1-1508.28. Moreover, pursuant to Executive Order, all federal agencies must comply with CEQ regulations. Exec. Order No. 11,991 § 2, 3 C.F.R. §§ 1966-1970 (1977); *see* 40 C.F.R. § 1500.3. CEQ has defined the statutory terms that were not defined by Congress. *See* 40 C.F.R. §§ 1502.3, 1508.3, 1508.8, 1508.14, 1508.17, 1508.18, 1508.23, 1508.27. Thus, CEQ regulations provide that a " 'Proposal' exists at that stage in the development of an action when an agency . . . has a goal and is actively

preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated." *Id.* § 1508.23. Additionally, a "'Major Federal action' includes action with effects that may be major and which are potentially subject to Federal control and responsibility." *Id.* § 1508.18. "Major Federal action" also includes "new and continuing activities," as well as "new or revised agency rules, regulations, plans, policies, and procedures." *Id.* "Major reinforces but does not have a meaning independent of significantly." *Id.* "Significantly . . . requires considerations of both context and intensity." *Id.* § 1508.27. "[C]ontext" requires consideration of "society as a whole, the affected region, the affected interests, and the locality." *Id.* "[I]ntensity" "refers to the severity of the impact" and requires consideration of the following: (1) "impacts that may be both beneficial and adverse"; (2) "unique characteristics of the geographic area"; (3) "the degree to which the effects on the quality of the human environment are likely to be highly controversial"; (4) "the degree to which the action may establish a precedent for future actions with significant effects." *Id.* Furthermore, CEQ defines "affecting" as "will or may have an effect on," including direct and indirect effects. *Id.* §§ 1508.27, 1508.8. Finally, CEQ regulations provide that "'Human Environment' shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment." *Id.* § 1508.14.

If an agency is unsure whether a proposed action requires an EIS, an environmental assessment ("EA") must be prepared. *Id.* § 1507.3(b)(2)(iii). An EA includes discussions of the need for the action, alternatives, and environmental effects of the proposal and alternatives. *Id.*

§ 1508.9. Based upon the EA, an agency may then decide to prepare an EIS or may issue a finding of no significant impact ("FONSI"), which obviates the need for an EIS. *Id.* § 1508.13. When an EIS is necessary, agencies are required to open a comment period on the draft EIS to the public and state and federal agencies with jurisdiction over and expertise in the subject matter. *Id.* § 1503.1. After consideration of these comments, a final EIS is published. CEQ regulations stress that "it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork . . . but to foster excellent action." *Id.* § 1500.1(c).

B. The Policy of NEPA.

As Justice Thomas determined in *Department of Transportation v. Public Citizen*, the primary purpose of an EIS is to inform agency decision making. 541 U.S. 752, 768 (2004). CEQ regulations, however, suggest a much broader purpose, that is, information sharing. For example, agencies preparing an EIS must include "reasonable alternatives not within the jurisdiction of the lead agency," 40 C.F.R. § 1502.14, to inform other agencies and to foster interagency discussion concerning the range of alternatives. In fact, the District of Columbia Court of Appeals, in *Natural Resources Defense Council, Inc. v. Morton*, noted that NEPA was intended to provide a basis for discussion among executive decision makers. 458 F.2d 827 (D.C. Cir. 1972), restricted by *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978); *see Dept. of Transp.*, 541 U.S. at 768.

Additionally, NEPA creates a forum for public involvement and ensures that the public is aware of the

environmental consequences of government proposals. For example, CEQ regulations require agencies preparing an EIS to make "diligent efforts" to involve the public throughout the process. 40 C.F.R. § 1506.6. As Justice Thomas, writing for the Court, held in *Department of Transportation*, the "'informational role' of an EIS is to 'give the public the assurance that the agency has indeed considered environmental concerns in its decision making process' and, 'perhaps more significantly, provide a springboard for public comment' in the agency decision making process itself." 541 U.S. at 768-769 (internal citations omitted).

II. THE BLM CLOSURE ORDERS AT ISSUE ARE "PROPOSALS FOR [] MAJOR FEDERAL ACTIONS SIGNIFICANTLY AFFECTING THE QUALITY OF THE HUMAN ENVIRONMENT."

A. This Court Interprets NEPA Section 102(c) as Requiring Agencies to Prepare an EIS or EA in Cases Such as This.

This Court held, in *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772 (1983), that Section 102(c) of NEPA is triggered when there is a "reasonably close causal relationship between a change in the physical environment and the effect at issue" and that NEPA requires considerations of the effects of present physical actions and the ramifications of possible future outcomes on the environment. *Id.* at 774, 779.

B. The Tenth Circuit Erred in Rejecting Petitioner's NEPA Claim Without Answering the Threshold Question of Whether NEPA Applies.

The Tenth Circuit "reject[ed]" Petitioner's NEPA argument without answering the threshold question of whether NEPA applies to the BLM proposals, *Utah Shared Access Alliance*, 463 F.3d at 1136, notwithstanding that the BLM's closure orders are precisely the type of agency actions that trigger NEPA compliance. Although the Tenth Circuit discussed NEPA and determined correctly that:

> NEPA requires all agencies that propose a "major federal action" that significantly affects the quality of the environment to prepare an [EIS] that describes the 'environmental impact of the action; unavoidable adverse environmental effects; alternatives to the action; relationship between the short-term uses and long-term productivity of the affected environment; and irretrievable and irreversible commitments of resources should the action be implemented,

and that an EA and/or EIS is required when a Resource Management Plan ("RMP") is amended, *id.* at 1131, the Tenth Circuit failed to address whether the BLM's proposal to close vast amounts of federal land to public access triggered NEPA.

That the BLM's proposals constitute "major federal actions" for purposes of NEPA § 102(C) is apparent from the BLM's closure order:

> Notice is hereby given that effective immediately, the Bureau of Land Management (BLM), Salt Lake Field Office, revokes the seasonal Notice of Closure of Public Lands published on April 27,

> 1999 and the Notice of Closure of Public Lands published on March 28, 2000. Notice is hereby given that effective immediately, [Off Road Vehicle] use in the following five areas of Box Elder County is limited to designated routes: Devils Playground (9838 acres), Grouse Creek Mountains (62654 acres), and Wildcat Hills (12640 acres). The remaining public lands in Box Elder County will be managed according to the Box Elder Resource Management Plan.

App. to Pet. Cert. at 104a. (internal citations omitted). Thus, with its closure order, the BLM revoked seasonal closures and replaced them with a permanent closure affecting hundreds of miles of roads throughout a vast region of Utah.

Although CEQ regulations set forth four types of proposed federal actions that trigger NEPA, to wit, policies, plans, programs, and projects, 40 C.F.R. § 1508.18(b), that list is not all inclusive. In fact, CEQ regulations provide that a "'[p]roposal' exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated." *Id.* § 1508.23. The BLM closure order clearly falls into this category. The BLM had as its "goal" a plan to close certain roads and was "actively preparing to make a decision on" a "means of accomplishing that goal"; moreover, that "goal" had "effects" [on "the human environment"] that "[could have been] meaningfully evaluated." The BLM, however, refused to comply with NEPA in that it neither considered other alternatives and their effects on the environment nor permitted public participation.

With its closure order, the BLM "significantly" affected the "human environment" by denying public access to hundreds of miles of roads for a host of activities in which the American public, the people of Utah, and units of government there had an interest. Those lawful activities included, but were not limited to, off road vehicle recreation, energy exploration and development, hunting, fishing, hiking, and camping, and mineral entry.

This closure order is "significant" because it affects not only this region in Utah, but also the remainder of the country due to the vast range of user-groups affected. Additionally, the impacts of the closure order were both beneficial and adverse. While the BLM alleges the closure was for the benefit of the environment, the order includes adverse effects for the affected user-groups. The "significan[ce]" of the BLM's closure order is revealed further by the unique characteristics of the geographic area affected. This region of Utah, which is not only unique in the United States but also contains one of the highest densities of public land available for multiple uses, is immensely popular among a number of diverse user-groups. That is, multiple user-groups frequent these areas specifically for the unique characteristics of this geographic area and the inherently unique recreational opportunities afforded. As a result, any proposal that affects the quality of the human environment in this geographic area is highly controversial; this litigation is but one small indication of the volatility of such proposals. This closure order is also "significant" because of the highly controversial nature of the resulting effects to the human environment. Evidence of this is again found in the litigation leading to this petition for *Certiorari*.

The "significance" of this closure order is found further in the precedent BLM has established and the resulting significant effects. Failing to require NEPA compliance in this instance allows the BLM, and other agencies, to take agency action in a vacuum. This is not the purpose of NEPA; NEPA acts as a check on agency action by allowing political, public, and personal interests a window into agency action. This public forum is not discretionary and in this case, BLM compliance was mandatory.

Nonetheless, at no time prior to its implementation of its closure order did the BLM publish a range of alternatives to its closure order, analyze the immediate and cumulative environmental impacts of the closure order, or permit the public to comment on the closure order. Even if an EIS had not been required, the BLM was required to adhere to section 102(2)(E) of NEPA, which requires the agency to "study, develop, and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E). Therefore, at minimum the BLM was required to prepare an EA. Even this, the BLM refused to do.

III. THE TENTH CIRCUIT'S HOLDING HAS WIDE IMPLICATIONS ON PUBLIC LANDS THROUGHOUT THE CIRCUIT.

The Tenth Circuit's failure to apply NEPA as required by federal law and this Court's precedents, will allow all federal land management agencies through the states of Utah, New Mexico, Colorado, Wyoming, Kansas, and Oklahoma including the BLM, the U.S. Forest Service, the National Park Service, the U.S. Fish and Wildlife Service, the Bureau of Reclamation, and the U.S. Department of

Defense, for the first time since 1969, to propose and implement "major federal action [] significantly affecting the quality of the human environment" without NEPA compliance. Millions of acres of federal land, managed by these federal agencies, lie within these four states; furthermore, the controversial nature of the types of activities, such as oil and gas development, permitted on these lands compels proper application of NEPA.

Given the refusal of the Tenth Circuit to interpret the law in accordance with the requirements of the holdings of this Court, the Petition should be granted.

IV. THERE IS A SPLIT IN THE CIRCUITS AS TO WHETHER AN EIS IS REQUIRED WHEN PROPOSED AGENCY ACTION PURPORTEDLY BENEFITS THE ENVIRONMENT.

As the Tenth Circuit noted below, there is a split in the circuits as to whether an EIS is required when proposed agency action purportedly benefits the environment. *Utah Shared Access Alliance v. Carpenter*, 463 F.3d 1125 n.4 (10th Cir. 2006) For example, the Fourth Circuit, in *Virginians for Dulles v. Volpe*, 541 F.2d 442, 445 (4th Cir. 1976), held that a change in airport hours of operations and flight patterns, which plaintiffs maintained would benefit the environment, fell within the scope of NEPA and required an EIS. However, the Ninth Circuit, in *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), held that "[a]n environmental assessment or an environmental impact statement is not necessary for federal actions that conserve the environment." *Id.* at 1505. Given this split in the Circuits, this Court should grant the petition to resolve the issue.

CONCLUSION

For the foregoing reasons, Mountain States Legal Foundation respectfully requests that this Court grant the Petition for *Certiorari* in order to determine whether BLM must comply with procedural requirements of NEPA section 102 when issuing closure orders that are "major federal actions significantly affecting the quality of the human environment."

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